STATE OF MICHIGAN

COURT OF APPEALS

SHARON SMITH,

Plaintiff-Appellant,

v

DENNIS MARTIN JOY, MD and CHARLEVOIX AREA HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
August 8, 2006

No. 268687
Charlevoix Circuit Court
LC No. 02-144119-NH

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right an order granting defendants summary disposition. We affirm.

Plaintiff sustained a fall from a horse, suffering a leg laceration. She was treated at defendant Charlevoix Area Hospital's emergency room by defendant Dr. Dennis Joy. Dr. Joy allegedly failed to prescribe plaintiff antibiotics. She subsequently developed an infection for which further treatment was necessary. Plaintiff thereafter commenced this action for injuries resulting from the infection. Defendants sought summary disposition, challenging plaintiff's standard-of-care expert. In an unpublished opinion, this Court reversed and remanded the dispute, concluding that plaintiff's then expert was qualified to testify regarding the appropriate standard of care. *Smith v Joy*, unpublished opinion per curiam of the Court of Appeals, issued September 27, 2005 (Docket No. 254324), slip op at 3. Upon remand, defendants alternatively argued that plaintiff's initial Affidavit of Merit (AOM) was statutorily insufficient. The trial court agreed and granted defendants summary disposition pursuant to MCR 2.116(C)(8) and (10).

Plaintiff first argues that the circuit court erred in concluding her AOM failed to meet certain statutory requirements. We disagree. We review rulings on motions for summary disposition de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005). Review of a motion for summary disposition under MCR 2.116(C)(8) assesses whether the "factual allegations in the nonmoving party's pleadings are true and . . . [whether] there is a legally sufficient basis for the claim." *Salinas v Genesys Health Sys*, 263 Mich App 315, 317; 688 NW2d 112 (2004). Review of a motion for summary disposition under MCR 2.116(C)(10) assesses whether a genuine issue of material fact remains and, if not, whether the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d

760 (2001). We review questions of statutory interpretation de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). Clear and unambiguous statutory language is given its plain meaning and is enforced as written. *Hines v Volkswagen of America Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

The Revised Judicature Act (RJA), MCL 600.101 *et seq.*, requires that "[t]o commence a medical malpractice action, a plaintiff must file both a complaint and an affidavit of merit." *Saffian v Simmons*, 267 Mich App 297, 302; 704 NW2d 722 (2005). Section 2912d of the RJA provides, in part, as follows:

> (1) . . . [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [MCL 600.2912d(1)(a)-(d).]

By the plain language of § 2912d, plaintiff's AOM fails to meet the statutory requirements. *Hines*, *supra* at 437. It fails to indicate that plaintiff's expert reviewed the notice of intent and its allegations. It fails to indicate the appropriate standard of care, but merely assumes it, indicating that Dr. Joy deviated from it. It fails to indicate the "manner in which the breach . . . was *the* proximate cause of the injury." MCL 600.2912d(1)(d) (emphasis added); see 1 Atkinson, Torts: Michigan Law & Practice (2d ed), § 6.38, p 6-38 (observing the legal distinction between "the" proximate cause and "a" proximate cause). Rather, the AOM indicates that plaintiff's injury was caused "at least in part" by Dr. Joy's conduct. Indeed, it fails even to articulate the "manner" whereby Dr. Joy's conduct foreseeably caused plaintiff's injury. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496-497; 668 NW2d 402 (2003) (observing that proximate cause "depends in part on foreseeability"). Accordingly, plaintiff's AOM fails to comply with § 2912d. See *Ward v Rooney-Gandy*, 265 Mich App 515, 528-529; 696 NW2d 64 (2005) (O'CONNELL, J., dissenting) (concluding that an AOM failed to satisfy § 2912d because it failed to specify statutory requirements), rev'd 474 Mich 917 (2005) (adopting

reasoning in Judge O'Connell's dissent). The circuit court thus did not err in concluding that the AOM failed to satisfy the RJA for these reasons.

In the event an AOM fails to comply with § 2912, dismissal without prejudice is generally the appropriate sanction. *Geralds v Munson Healthcare*, 259 Mich App 225, 238-239; 673 NW2d 792 (2003); see also *Scarsella v Pollak*, 461 Mich 547, 551; 607 NW2d 711 (2000). However, while a medical malpractice plaintiff whose claim is dismissed without prejudice "can refile properly at a later date, . . . [that plaintiff] still must comply with the applicable period of limitation." *Id.* at 551-552.

MCL 600.5805(6) provides that the statute of limitations for medical malpractice actions is two years. A defective or inadequate AOM is insufficient to constitute an AOM within the meaning of § 2912d. *Geralds, supra* at 240; *Mouradian v Goldberg*, 256 Mich App 566, 574; 664 NW2d 805 (2003). Because a medical malpractice action is not properly commenced if the statutorily contemplated AOM is not filed with the complaint, the period of limitations is not tolled. *Geralds, supra* at 240; *Mouradian, supra* at 574-575; see also *Saffian, supra* at 302-303 ("An affidavit of merit that is grossly nonconforming to the statutory requirements is not an affidavit of merit that satisfies the statutory filing requirements and does not support the filing of a complaint that tolls the running of the period of limitations."); *Kirkaldy v Rim (On Remand)*, 266 Mich App 626, 629, 636-637; 702 NW2d 686 (2005).

Plaintiff alleges her injury occurred on June 26, 2000. Because her claim accrued on this date, MCL 600.5838a, the period of limitations expired on June 26, 2002, two years later, MCL 600.5805(6). Plaintiff's complaint and AOM were filed on June 24, 2002. Because plaintiff's AOM was defective, it was insufficient to constitute a valid AOM under § 2912d. *Geralds, supra* at 240; *Mouradian, supra* at 574. Plaintiff's malpractice claim was therefore not commenced, *Geralds, supra* at 240; *Mouradian, supra* at 574-575, and the applicable period of limitations expired two days later. MCL 600.5805(6). As plaintiff's action was defective from its inception, the period of limitations was not tolled. *Geralds, supra* at 240; *Mouradian, supra* at 574-575. Although plaintiff's inadequate AOM would generally only require dismissal without prejudice, *Geralds, supra* at 238-239; see also *Scarsella, supra* at 551, because the period of limitations has now expired, dismissal with prejudice is appropriate, *Kirkaldy, supra* at 629, 636-637. The court therefore did not err in effectively dismissing plaintiff's claim with prejudice by granting summary disposition to defendants.

Plaintiff argues that defendants waived this statute of limitations defense by failing to assert it in a timely manner. However, the record belies plaintiff's argument, illustrating that defendants challenged plaintiff's AOM on these grounds in their first responsive pleading. This affirmative defense was not a waiver. *Moore v Moore*, 266 Mich App 96, 103; 700 NW2d 414 (2005) (noting that waiver is the "voluntary and intentional relinquishment of a known right").

Plaintiff further argues that the limitations period should be equitably tolled. We disagree. Our Supreme Court has recognized that the principles of equitable tolling apply where "an understandable confusion" has arisen among the bench and bar. See *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004). In *Ward* this Court recognized and applied equitable tolling principles in the context of a litigant's error in filing an AOM relating to a different malpractice action. *Ward, supra* at 516. The Court considered such tolling appropriate because the claimant actively pursued his judicial remedies but filed a

defective pleading. *Id.* at 520. However, our Supreme Court reversed *Ward* for the reasons stated in the dissent. *Ward v Rooney-Gandy*, 474 Mich 917, 917; 705 NW2d 686 (2005). In that dissent, Judge O'Connell concluded that application of equitable tolling was inappropriate because the mistake in that case was the result of "negligent failure" rather than "understandable confusion." *Ward, supra* at 528-529 (O'CONNELL, J., dissenting).

In this dispute, plaintiff's failure to conform the AOM to § 2912d was likewise the product of negligent failure. Inasmuch as they relate to the technical requirements of an AOM, plaintiff's obligations under § 2912d are unambiguously clear. *Hines, supra* at 437. The AOM failed to indicate the appropriate standard of care, proximate cause, and that plaintiff's expert reviewed the notice of intent. Section 2912d expressly requires that this information be included. MCL 600.2912d. Equitable tolling is inappropriate under these circumstances.

Because our resolution of the above questions is dispositive, we decline to address plaintiff's remaining issues on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot